

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-SEVEN**

ALBERTSON'S, INC.¹,

Employer,

and

Case 27-RD-1131

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN, AND HELPERS OF
AMERICA, LOCAL UNION #222,

Union,

and

JOSEPH RICHMOND,

Petitioner.

DECISION AND DIRECTION OF ELECTION

On August 11, 2003², Joseph Richmond (Petitioner) filed a petition under Section 9(c) of the National Labor Relations Act (Act) seeking an election to decertify the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local Union #222 (Union) as representative of employees in the bargaining unit. On August 20, a hearing was held before a hearing officer of the National Labor Relations Board, and following the hearing the parties filed briefs. The Petitioner seeks a decertification election for the following stipulated unit:

¹ The name of the Employer appears as amended at hearing.

All drivers, warehousepersons, warehouse mechanics, truck mechanics, tire person and fuelers, washers, lubrication and maintenance employees employed by Albertson's, Inc., at its distribution facilities located at 620 West 600 North, North Salt Lake City, Utah; excluding the warehouse managers, foreperson and assistant foreperson, banana buyers, stampers, salvage and cleanup employees, janitors, dispatchers, salespersons, office clerical employees, confidential employees, professional employees, guards, watchpersons, and supervisors as defined by the Act.

This case presents the issue of whether the petition should be dismissed because there is a contract in existence that would bar an election. The Union contends that the petition is blocked by a contract between the parties, which was first agreed to in March, but not ratified by the employees until August 2. Albertson's Inc., (Employer) argues that the asserted contract is not a bar to a decertification election, because although the document at issue was negotiated and eventually ratified, it was never signed.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director. Based upon the entire record in this proceeding I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes and policies of the Act to assert jurisdiction herein.
3. The Union is a labor organization within the meaning of the Act and claims to represent certain employees of the Employer.

² All subsequent dates to be 2003, unless otherwise noted.

4. The Petitioner is a current, non-supervisory employee of the Employer and member of the bargaining unit that the Union represents.
5. Based upon the record, a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Based on the facts and the case law outlined below, I find that there is not a contract bar to a decertification election.

FACTS

Albertson's, Inc. is a Delaware corporation that operates a Distribution Center in North Salt Lake City, Utah. During the past 12 months, the Employer purchased and received at its Utah facilities goods valued in excess of \$50,000 directly from suppliers located outside the State of Utah.

The Employer and the Union had a collective bargaining agreement in place covering the petitioned-for employees that was in effect from January 4, 1998 to January 25, 2003. Under Article 35 of this agreement, either party could seek to negotiate a new contract when the expiration date came near. The Union timely reopened the contract by letter dated November 21, 2002. Thereafter, the parties engaged in negotiations on or about January 12, January 23, February 12, February 27, February 28, and March 18.

The record establishes that on March 18, the parties reached a tentative agreement³ that was signed by both parties⁴ and subsequently presented to the Union membership for ratification. On or about March 22, the membership voted to reject the March 18 Settlement Agreement. The Union notified the Employer of this rejection by telephone that same evening and sent a confirming letter dated March 24, which also noted that the Union was seeking a meeting (for further negotiations).

On or about June 10, 2003, the parties met again. At that time, the Employer offered the Union the same terms as set forth in the March 18 Settlement Agreement, but wage increase retroactivity was offered only if it were ratified by the membership on or before June 22. The Union agreed to present the March 18 Settlement Agreement to its members. By letter dated June 11, the Employer memorialized the fact that the parties agreed that the March 18 Settlement Agreement would again be recommended by the Union to its members; the fact that the Employer had not agreed to enhance the offer in any way; and the fact that, if the March 18 Settlement Agreement was not ratified by the membership by June 22, the Employer would withdraw its offer for retroactive wage increases to January 25.

By letter dated June 23, the Union acknowledged the Employer's offer but stated that, while it had originally indicated that it intended to recommend ratification to its members, it no longer planned to do so. In this letter, the Union noted that the scheduled ratification meetings had been cancelled and that the Union was seeking additional

³ At hearing, the parties orally referred to this agreement as the tentative agreement and as the Agreed Upon Offer, and in letters presented as exhibits, the parties refer to the agreement as the Settlement Agreement. For purposes of clarification and consistency, I will refer to this agreement as the March 18 Settlement Agreement.

⁴ The exact date of the signing is not known; however, both parties agreed that it was signed within the next few days.

bargaining prior to any offer being presented to the membership for ratification. Thus, as of that time, the Employer's offer in the March 18 Settlement Agreement to provide wage increases retroactive to January 25 was withdrawn.

Nothing further happened relative to bargaining until July 29, when the parties spoke by telephone. In that telephone conversation, the Union agreed to present the March 18 Settlement Agreement, which the Employer described as its "Last, Best, and Final Offer," without a recommendation on whether or not the members should ratify this proposal. By letter dated July 29, the Employer memorialized the conversation earlier that day noting that the Employer was again proposing the terms of the March 18 Settlement Agreement, which the Employer characterized as its "Last, Best, and Final Offer." This letter further stated that the Employer's proposal included wage increase retroactivity to January 25, as originally provided in the March 18 Settlement Agreement and the fact that (contrary to the express terms of the March 18 Settlement Agreement) the Union would not recommend the Employer's proposal to the membership.

On or about August 2, the members voted to ratify the March 18 Settlement Agreement. That evening, the Union informed the Employer by telephone that the March 18 Settlement Agreement had been ratified. The parties agreed that the Employer would prepare the document in final form and that it would then be signed and executed by the parties. Before any further documents were signed memorializing this agreement, the Petitioner filed the instant petition on August 11, seeking to decertify the Union.

By letter dated August 13, the Employer informed the Union that, even though there was not a signed agreement in place and the decertification petition had been filed, the Employer planned to compensate its employees for the time period from January 25,

to the present by granting the retroactive wage increases provided in the ratified agreement.

ANALYSIS

1. Background law

In order for an agreement to serve as a bar to an election, it must satisfy certain substantive and formal requirements that have been well established by Board caselaw. Specifically, in *Appalachian Shale Products, Co.*, 121 NLRB 1160 (1958), the seminal case setting forth these requirements, the Board held that, to constitute a bar to an election, an agreement containing substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship must be signed by the parties prior to the filing of the petition.

In *De Paul Adult Care Communities, Inc.*, 325 NLRB 681 (1998), the parties orally resolved all outstanding contractual issues but the employer did not sign either of the proposed revisions submitted to it by the union, nor did it reduce its own proposals to a writing, which was thereafter signed. Relying on *Appalachian Shale* the Board held that without the employer's signature on the collective bargaining agreement or some document referring thereto, the agreement is insufficient to act as a bar. *Id.* at 682.

In *Seton Medical Center*, 317 NLRB 87 (1995), the Board held that there was no contract bar because there was no signed document or documents evidencing the finalization of the parties' negotiation process and memorializing the overall terms of the collective bargaining agreement. In this case the Board noted that the agreement need not be embodied in a formal document. An informal document or series of documents, such as a written proposal and a written acceptance, which nonetheless contain

substantial terms and conditions of employment are sufficient, if signed (emphasis added). *Id.* citing *Appalachian Shale* and *Georgia Purchasing*, 230 NLRB 1174 (1977).

2. Application

The Union relies upon the Board's decision in *St. Mary's Hospital*, 317 NLRB 89 (1995), as support for its position that a contract bar precludes the conduct of an election pursuant to the petition filed in this matter. In *St. Mary's Hospital*, the parties signed a tentative agreement, which incorporated by specific reference other signed and dated tentative agreements for individual issues that had been resolved between the parties during the course of negotiations. The issue presented in *St. Mary's Hospital* was whether the signed tentative agreement was sufficient to constitute a bar, despite the fact that there were several minor deviations between the language contained in those tentative agreements and the testimony of witnesses regarding the details to their actual agreement. Distinguishing the Board's prior holding in *Branch Cheese*, 307 NLRB 239 (1992), the Acting Regional Director in his Decision and Order issued in *St. Mary's Hospital* (that was adopted by the Board), found that the minor deviations on a few of the issues in the tentative agreement did not remove the contract as a bar. While the execution of a formal agreement had not been accomplished prior to the filing of the decertification petition in *St. Mary's Hospital*, the employer in that matter had implemented the terms of the tentative agreement in substantial part, if not in their entirety.

The critical issue raised in the instant matter is whether a signed tentative agreement that has been rejected (and the subject of further negotiation and revision without the benefit of subsequent signatures of approval by the parties prior to eventual

ratification by the membership) constitutes a bar to an election, even if the eventual proposal ratified by the membership is essentially unchanged from the proposal initially rejected. It is beyond dispute that, following membership rejection of the March 18 Settlement Agreement on March 22, a timely decertification petition could have been filed. In that regard, it is clear that the Union requested, and the parties engaged in, further negotiations following that rejection. During the course of these subsequent negotiations, I find that the parties' March 18 Settlement Agreement had lost its legal vitality and could not have stood as a bar to an election.

I note that there are critical differences between the facts herein and those found in *St. Mary's Hospital*. In *St. Mary's Hospital*, there was no rejection of the tentative agreement signed off on by the parties, the parties engaged in no subsequent bargaining regarding the terms of the signed tentative agreement, and prior to the filing of a petition, the employer had implemented the terms of the signed tentative agreement. In contrast, in the case now under consideration, following membership rejection of the agreement the parties had approved in writing, the parties engaged in further bargaining over more than four months resulting in modification of the economic terms of the proposal under consideration and eventual return to the same essential terms originally rejected by the membership, and those terms had not been implemented prior to the filing of an election petition. Thus, although the Union and the Employer ended up with the same essential agreement after months of further bargaining, it cannot be said that the March 18 signed agreement survived in tact throughout that period. Rather, I find that to be a bar to an election, there must be some agreement signed after the conclusion of bargaining "evidencing the finalization of the parties' negotiation process." *Seton Medical Center*,

supra. To rely on possible coincidence or happenstance that the terms of the two agreements are essentially the same creates too much uncertainty in an area where the Board insists on certainty.⁵

The essential facts of the instant situation are more similar to those in *Waste Management of Maryland*, 338 NLRB No. 38, (2003). In that matter the union and the employer negotiated a contract, which the employer entitled, “Final Agreement Tentatively Reached Between the Parties as a Result of Negotiation Ending July 11, 2002” and which the employer sent unsigned to the union on July 15. Attached to this offer was a signed cover letter. The employees rejected this July 15 offer, and the parties resumed bargaining. In early September, the parties agreed to change the contract duration from four to five years, but the change was not put into writing. Later in September, the union took the revised offer to the members, which was again rejected.

⁵ On brief, the Union focuses extensively on whether the parties’ agreement on July 29 did or did not require the ratification of the Union membership in order to constitute a final and binding collective bargaining agreement that would bar an election pursuant to the decertification petition filed in this matter. I find that issue to be immaterial to the resolution of this case. It is clear that the parties treated Item No. 25 of the March 18 Settlement Agreement, which reads: “IBT Local 222 will recommend the offer to employees” as requiring membership ratification. It is also undisputed that the Union did not agree to recommend the Employer’s proposal at the ratification vote on August 2. While arguably the Union did not, in fact, reach agreement with the Employer on July 29 and did nothing more than agree to accept what was then being referred to as the so-called “Last, Best, and Final Offer”, if approved by the membership on August 2, after that date, unquestionably, the parties had reached agreement on the terms of a contract. Accordingly, had the Union requested the Employer to sign off on the contract terms offered by the Employer and ratified by the membership on August 2, the Employer would have been obligated to do so. However, there is no record evidence that the Union demanded execution of any agreement following ratification and prior to the filing of the petition herein. Notwithstanding these events, the Union’s arguments relative to the necessity of membership ratification do not resolve the dispositive question presented, which is whether the signed March 18 Settlement Agreement survived as the requisite “signed” agreement under *Appalachian Shale* and its progeny in view of the intervening relevant events during the four months following the written approval of that document.

The union then faxed a letter to the employer accepting the final offer. A day later, the decertification petition was filed.

In *Waste Management of Maryland*, the Board disagreed with a Regional Director's decision that the parties had satisfied the *Appalachian Shale* requirements, based on the employer's written proposal, the employer's signature on the July 15 cover letter, and the union's September acceptance letter. Specifically, the Board found that "informal documents laying out substantial terms and conditions of employment can serve as bar, so long as these informal documents are signed. See *De Paul Adult Care Communities*, supra, *Seton Medical Center*, supra. ... this flexibility does not excuse parties from the fundamental requirement that they signify their agreement by attaching their signatures to a document or documents that tie together their negotiations by either spelling out the contract's specific terms or referencing other documents which do so." *Id.* at 2."

Although in the case at hand, the parties had initially executed a written tentative agreement, as in *Waste Management of Maryland*, the parties resumed negotiations after the proposed contract was initially rejected. In both circumstances, the parties never gave specific written approval to agreements reached in subsequent bargaining. As noted above, in the case now under consideration, the fact that the essential terms of the eventual contract ratified by the membership in the case under consideration matched those presented and rejected by the membership more than four months prior may be nothing more than coincidence. I find that events overtook whatever agreement the parties signed on or about March 19, and under *Seton Medical Center* and *Waste Management of Maryland*, a signing of the ultimate terms of agreement is lacking.

CONCLUSION

For the reasons set forth above, I find that no contract bar existed as of August 11, when the petition in this matter was filed. Accordingly, a question concerning representation exists requiring an election to determine whether or not the Union continues to represent the petitioned-for employees.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the Unit found appropriate, as discussed above, at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.⁶ Eligible to vote are those in the Unit who were employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are

⁶ Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed. Please see the attachment regarding the posting of election notice.

eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION #222

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, three (3) copies of an election eligibility list containing the *full* names and addresses of all the eligible voters meeting the eligibility formula discussed above shall be filed by the Employer with the Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 600 17th Street, 700 North Tower, Dominion Plaza, Denver, Colorado 80202 by **September 10, 2003**. No

extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. The Board in Washington must receive this request by September 17, 2003. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at Denver, Colorado this 3rd day of September 2003.

B. Allan Benson, Regional Director
National Labor Relations Board, Region 27
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Denver, Colorado 80202-5433

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